

# Government Petition to Court of Appeals Here

Following is the text of a government petition filed with the U.S. Court of Appeals here seeking a rehearing and modification of a decision governing Washington Post publication of the secret Pentagon documents.

## Petition for Rehearing And Modification Of Decision

1. While this case was pending before this court, a closely related case involving The New York Times was pending before the United States Court of Appeals for the Second Circuit. That court rendered a decision in that case shortly after five o'clock on the afternoon of June 23, 1971. A copy of the decision of that court is attached as an appendix to this petition.

2. Up until this time, neither the District Court in this case, nor this court, has examined any of the documents involved. On a matter involving the possibility of grave and immediate danger to the security of the United States, there should be an opportunity for an appropriate adversary hearing in court. The determination of such an issue should not be made independently of judicial review, even by the press.

3. Under the decision of the United States Court of Appeals for the Second Circuit, in the case involving The New York Times, there will be such a hearing with respect "to items specified in the Special Appendix filed with this Court (the Second Circuit) on June 21, 1971, or any of such additional items as may be specified by the plaintiff with particularity on or before June 25, 1971," for the purpose of determining whether any of these items "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."

4. Under the decision of this Court, The Washington Post is free to publish any

items it has after 6 p.m. on June 25, 1971, except certain items which its counsel stated in Court on June 22, 1971, would not be published. Judging from items appearing in The Washington Post for June 24, 1971, after the decision of this court, there appears to be uncertainty as to just what items are covered by the undertaking of counsel.

5. Both The Washington Post and The New York Times for June 24, 1971, state that The New York Times is going to appeal the decision of the Court of Appeals for the Second Circuit, presumably by application for a stay, and petition for certiorari. The United States plans to resist such application for stay, and to urge upon the Supreme Court that it not interfere with the decision of the Second Circuit, which provides for an appropriate adversary judicial hearing in the District Court on the question whether specified documents pose a grave and immediate danger to the security of the United States to warrant an injunction.

6. Under the decision of this court, as it now stands, The Washington Post will be free to publish all of these items, except the uncertain number of items which its counsel has stated will not be published. Thus, if the decision of the Second Circuit stands:

(a) The New York Times will be under a restraint which is not applicable to the Washington Post;

(b) This will be unfair to The New York Times;

(c) The opportunity provided by the decision of the Second Circuit for an adversary judicial determination of the question whether specified documents pose such grave and immediate danger to the security of the United States as to warrant an injunction will be

frustrated—for, any such proceedings in the District Court in New York will be futile if the items in question have already been published by The Washington Post.

7. If the decision and order of this court rendered June 23, 1971, are modified so as to make them consonant with the decision of the Court of Appeals for the Second Circuit (a) the remedy provided by the Second Circuit's decision will be preserved; (b) uncertainty will be eliminated as to the identity of the specific documents which counsel for the Washington Post has undertaken will not be published; (c) equality of treatment will be provided between The Washington Post and the New York Times; and (d) there will be an opportunity for an appropriate judicial hearing with respect to specified documents as to whether they pose such grave and immediate danger to the security of the United States as to warrant an injunction.

For these reasons, the United States prays that this petition for rehearing be granted, and that the decision and order of this Court rendered in this case on June 23, 1971, be modified so that it will read in the same terms as the decision of the Court of Appeals for the Second Circuit, likewise rendered on June 23, 1971, in the case of *United States v. New York Times Co.*, Docket No. 71-1617. Any such modification should, of course, provide that it will be subject to further modification in the event that the Court of Appeals for the Second Circuit, or the Supreme Court, modifies the

1971, and that the restraint provided here will be the same as that to which The New York Times is subject, thus preserving the relief which has been provided by the Second Circuit, but no more.

We request an opportunity for oral presentation with respect to this petition, at the earliest convenience of the court.

decision rendered by the Second Circuit in The New York Times case on June 23,